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No. 76-1093

In the Supreme Court of the United States

OCTOBER TERM, 1976

DRAVO CORPORATION AND LIBERTY MUTUAL INSURANCE COMPANY, PETITIONERS

v.

LOUIS MAXIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners contend that the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act do not provide coverage to persons who are engaged in the initial steps of building vessels and that, if they do, they are unconstitutional. Similar arguments have been made in *Halter Marine Fabricators, Inc.* v. *Nulty*, petition for a writ of certiorari pending, No. 76-880. For the reasons stated in our brief in opposition in *Halter Marine*, the decision of the court of appeals in the present case is correct, and there is no need for review by this Court.[1]

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[1]A copy of our brief in opposition in *Halter Marine* has been furnished to counsel for petitioners.

Respondent Louis Maxin worked for petitioner Dravo Corp. at its Engineering Works Division on the Ohio River at Neville Island, Pennsylvania (Pet. App. 28a). The Neville Island facility is devoted primarily to the construction of river barges and towboats; Dravo uses assembly-line techniques and builds more than 300 vessels each year (*id.* at 30a, 32a). The vessels are launched into the River's main channel once their hulls and most of their outfitting have been completed.

The only part of Dravo's Neville Island facility not used exclusively to build or repair ships is the structural shop, a building 2000 feet from the River's main channel but much closer to a secondary channel (Pet. App. 5a, 29a-30a). An employee working in the structural shop spends approximately 85 percent of his time fabricating steel for use in building ships; parts are cut and shaped for incorporation in vessels, and major portions of vessels are prefabricated. Parts then are transported by Dravo's internal rail line to the main channel of the River (*id.* at 30a-31a). A public road bisects Dravo's facility (Pet. App. 29a, 30a).

Maxin worked in Dravo's structural shop. On October 23, 1973, he was using a cutting torch to remove the corners of plates that were to form the bottoms and decks of barges; a stack of plates fell over behind him, severing both of his legs below his knees (Pet. App. 31a-32a).

The administrative law judge found that Maxin was a "typical shipbuilding employee" (Pet. App. 33a) and consequently a "shipbuilder" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1426, as amended, 86 Stat. 1251, 33 U.S.C. (Supp. V) 902(3). He also found that the

Engineering Works Division, despite its bisection by a public street, is "a large integrated shipyard * * * adjoining navigable waters" and consequently meets the maritime situs test of Section 3(a) of the Act, as amended, 86 Stat. 1251, 33 U.S.C. (Supp. V) 903(a). See Pet. App. 32a, 38a-39a. He awarded Maxin compensation under the Act (Pet. App. 41a).

The Benefits Review Board (Pet. App. 21a-24a) and the court of appeals (*id.* at 1a-19a) upheld the award. Both the Board and the court of appeals rejected petitioner's argument that employees who work on vessels before their keels are laid are not shipbuilders, and that the structural shop on Neville Island does not "adjoin" the navigable waters. The court of appeals also considered and rejected petitioners' argument that the Act, as so construed, exceeds Congress' admiralty powers.

We have pointed out in our brief in opposition in *Halter Marine* that there is no conflict among the courts of appeals concerning either the Act's application to shipbuilders or the constitutionality of the Act as applied to shipbuilders. We rely on that discussion here.

Petitioners in the instant case, unlike petitioners in *Halter Marine*, contend that the worker was not injured in a place satisfying the maritime situs requirement of Section 3(a) of the Act. That contention does not require review by this Court. Any part of a shipyard that is used for the construction of vessels satisfies the requirement of Section 3(a) that the injury occur on the "navigable waters of the United States (including *any* adjoining * * * terminal, building way, marine railway, or other adjoining area *customarily* used by an employer in loading, unloading, repairing, or building a vessel)" (emphasis added). The structural shop on Neville Island

is "customarily" used in building vessels, and it adjoins the Ohio River that surrounds the Island. No court of appeals has expressed a view of the situs requirement that would exclude coverage of a portion of a single facility, such as Dravo's, used as part of an integrated vessel contruction process.[2]

It is therefore respectfully submitted that a petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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APRIL 1977.

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[2]The Fifth Circuit has parted company with the other courts of appeals by requiring that the place where the injury occurs have been used for loading, unloading, building or repairing a vessel at the time of the injury, and holding that a place does not have the requisite maritime situs just because it is part of a large maritime facility devoted to these tasks. *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533, 541-542 (C.A. 5), petitions for writs of certiorari pending *sub nom. Halter Marine Fabricators, Inc.* v. *Nulty*, No. 76-880, and *Director* v. *Jacksonville Shipyards, Inc.*, No. 76-1166. Our petition for a writ of certiorari in No. 76-1166 asks the Court to review this approach, to the extent that it divides a single maritime facility into covered and uncovered locations. But the Fifth Circuit's approach is of no help to petitioners in the present case. In *Halter Marine* the Fifth Circuit upheld an award of compensation to a shipbuilder injured in a fabrication building some distance from the water, concluding that the building met the situs requirement because it was being used to build a vessel. See 539 F. 2d at 543-544. The same is true in the present case.